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Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-1080

In The

Supreme Court of the United States

TRANS UNION, LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] amicus curiae, the Consumer Data Industry Association ("CDIA"), formerly known as Associated Credit Bureaus, Inc., submits its brief in support of Trans Union LLC's petition for writ of certiorari.

The CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. CDIA's membership includes over 500 consumer credit, mortgage and other specialized consumer reporting agencies operating in the United States and throughout the world. CDIA is the largest trade association of its kind in the world. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace.

In its more than ninety-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of

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[1] Letters memorializing the consent of all parties to CDIA's filing of an amicus brief are on file with the Clerk of the Court. Petitioner is among the more than 500 credit reporting companies that are members of CDIA. Pursuant to Supreme Court Rule 37.6, CDIA states that this brief was authored entirely by CDIA and its counsel. No other person, entity, or counsel for any party made a monetary contribution to the preparation or submission of this brief.

consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts which led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendment. More recently, CDIA has published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by CDIA's members.

Consumer reporting agencies include credit bureaus, mortgage reporting agencies, employment screening companies and other specialized consumer information reporting agencies. Consumer reporting agencies may obtain data from creditors, insurers, employers, landlords and other subscribers. Consumer reporting agency files may also include public record information, such as repossessions, bankruptcies, judgments and criminal records. Each month, over two billion pieces of data are entered into consumer-related data files held by consumer reporting agencies in the United States. Each of the nation's three largest consumer reporting agencies, Equifax, Experian, and Trans Union, maintains over 190 million consumer information files.

From their data files, CDIA's members provide more than one billion consumer reports annually to their customers. Creditors and insurers use the reports in making rapid and informed decisions which reduce the cost and increase the availability of credit and insurance.[2]

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[2] *See*, Walter Kitchenman, *US Credit Reporting: Perceived Benefits Outweigh Privacy Concerns* at 4 (The Tower Group 1999) <http://www.privacyalliance.org/resources/kitchenman.pdf> ("Transparency of consumer credit data is the foundation of

Employers rely on reports to screen out dishonest or dangerous employees. Landlords use residential screening reports to make informed decisions that protect their legitimate business interests and the safety of other tenants. Consumer reports are used by law enforcement agencies in investigations and counter-terrorist activities. In short, consumer reporting agencies provide the information infrastructure that contributes to the soundness, safety and efficiency of the employment housing, insurance, banking, finance, retail credit and law enforcement systems in the United States.[3]

CDIA is vitally interested in the outcome of this case because the court of appeals incorrectly stated the law regarding the constitutional analysis to be applied to government restrictions on the collection, maintenance and distribution of information from consumer reporting

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consumer credit in the US. Outstanding consumer loans exceed both government debt and corporate debt in the US, and constitute sixty percent or better of US gross domestic product (GDP).").

[3] It has been estimated that American consumers save $100 billion a year because of the efficiency and liquidity made possible by accurate consumer information. Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access - A New Framework for Finding the Balance*, (1999) at 11, (citing Diogo Teixeira and Walter E. Kitchenman, *Bureaus Do a Credible Job*, The Banker (May 1998), at 104); Kitchenman, *US Credit Reporting*, at 7 (demonstrating that the accurate collection, maintenance and transfer of consumer reporting information provides for efficiencies in the secondary mortgage securities market saving consumers an average of 200 basis points on the cost of a mortgage).

agencies. Because CDIA has been involved in the consumer reporting industry for more than ninety years, and because it represents a variety of consumer reporting entities, CDIA believes that its experience allows CDIA to offer a unique perspective on the issues presented that will aid the Court in its decision.

SUMMARY OF ARGUMENT

This Court should grant Trans Union's petition for writ of certiorari to correct the court of appeals' misstatement of the law concerning the analysis that is applied to determine the level of First Amendment scrutiny used to evaluate governmental attempts to restrict speech by consumer reporting agencies.

This Court's well-settled precedent establishes that, in order to determine what level of scrutiny will be applied to restrictions on constitutionally protected speech, a reviewing court must first determine whether the speech implicates public or private concerns. This determination must be based on the content, form and context of the speech. The court of appeals' decision ignores this required analysis, substituting instead the blanket rule that when restrictions are applied to the information supplied by consumer reporting agencies to subscribers for a price, the speech at issue is necessarily of merely private concern, the restriction of which need only satisfy intermediate First Amendment scrutiny. The court of appeals' misstatement of the law represents a fundamental dilution of this Court's precedent regarding

the protection of consumer reporting agency speech provided by the First Amendment.[4] This error erodes the First Amendment freedoms essential to the efficient functioning of the American marketplace.

Because the court of appeals' misstatement of the law will affect the constitutional protection afforded consumer reporting agencies' speech beyond the facts of the *Trans Union* decision, the court of appeals' decision must be reversed.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING CONTRADICTS THE PRECEDENT UPON WHICH IT RELIES.

Relying upon this Court's prior decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the court of appeals denied Trans Union's petition for rehearing, holding that "Trans Union's target marketing lists comprise speech of purely private concern" entitled to only qualified constitutional protection and that the Federal Trade Commission's ("FTC") restriction on this speech should be reviewed under the intermediate scrutiny standard.[5] *Trans Union Corp. v. F.T.C.*, 267 F.3d

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[4] Although petitioner Trans Union has identified a number of other issues to be considered by the Court if its petition is successful, CDIA's brief is limited to the First Amendment error discussed herein.

[5] This Court's prior decisions have established that different standards of scrutiny are applied to determine the

1138, 1140-41 (D.C. Cir. 2001). In reaching this conclusion, the court of appeals emphasized that "[t]he important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its specific business audience (its customers)." *Id.* at 1140.

The court of appeals' holding establishes a blanket rule that any consumer-related information provided by a consumer reporting agency to its customers for a price is always and only of private concern and can be regulated or entirely prohibited by laws or rules which only pass intermediate constitutional scrutiny. *See, Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 819 (D.C. Cir. 2001) ("the FCRA is not subject to strict First Amendment scrutiny"). This result is contrary to this Court's holding in *Dun & Bradstreet* which requires a more discerning case-by-case (*i.e.*, "content, form, and context") analysis for each proposed restriction on speech, including speech subject to the provisions of the FCRA.

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constitutionality of speech restrictions depending upon the "public" or "private" concerns implicated by the speech. *Dun & Bradstreet*, 472 U.S. at 759. The highest level of protection, strict First Amendment scrutiny, is given to speech of public concern, and provides that the regulation of such speech will only be upheld if it promotes a compelling governmental interest and is the least restrictive means of furthering the articulated interest. *See, Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). A lower level of protection, intermediate First Amendment scrutiny, is given to speech of private concern, and provides that the regulation of such speech will be upheld if the asserted governmental interest is substantial and the regulation directly advances the interest and is no more extensive than necessary to serve the interest. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

In *Dun & Bradstreet*, this Court defined the issue before it as whether Dun & Bradstreet's "credit report involved a matter of public concern." *Id.* at 761. This Court then set forth the test to be used to resolve this issue, that is: "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Id.* (ellipses in original). Applying this test to the record before it, this Court concluded that Dun & Bradstreet's "credit report concerns no public issue" and "warrants no special protection" because it was "wholly false," was "clearly damaging to the victim's business reputation," and "was made available to only five subscribers, who, under the terms of their subscription agreement, could not disseminate it further. . . . " *Id.* at 762; *see also, U.D. Registry, Inc. v. State*, 34 Cal.App.4th 107, 115, 40 Cal.Rptr.2d 228, 232 (1995) (emphasizing the significance of the "defamation" context underlying the *Dun & Bradstreet* decision), *cert. denied*, 516 U.S. 1074 (1996)).

In reaching its holding in *Dun & Bradstreet*, this Court specifically *did not* find that credit reports are always and only of private concern. To the contrary, this Court emphasized the necessity of a careful case-by-case analysis:

> The dissent suggests that our holding today leaves *all credit reports* subject to reduced First Amendment protection. *This is incorrect*. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also *do not hold*, as the dissent suggests we do, . . . that the report is

> subject to reduced constitutional protection because it constitutes economic or commercial speech.

Id. at 762 n. 8 (emphasis added).

Rather than apply the complete *Dun & Bradstreet* "content, form and context" analysis, the court of appeals concludes that the required analysis is satisfied merely by finding that the restricted speech is a consumer report subject to the FCRA. *Trans Union*, 267 F.3d at 1140. This truncated analysis is constitutionally inadequate and turns the holding of *Trans Union* into a blanket rule that all information reporting by consumer reporting agencies for a fee may be restricted or entirely prohibited if the intermediate scrutiny standard is satisfied.

II. THERE IS NO SUPPORT FOR THE COURT OF APPEALS' BLANKET RULE THAT CONSUMER REPORTING AGENCY SPEECH IS ALWAYS AND ONLY OF "PRIVATE" CONCERN.

This Court's prior decisions establish that merely because information is conveyed for a price, it does not thereby cease to be of "public" concern and may, in fact, still be entitled to the fullest protection afforded by the First Amendment. *See, e.g., Dun & Bradstreet*, 472 U.S. at 762 n. 8.; *accord Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *see also, Rubin*, 514 U.S. at 481

("the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' ").

Moreover, this Court's prior discussions of the First Amendment protection given to admittedly commercial speech reveal that the decision concerning the level of protection applied to particular speech must take into account the content, form, and context of the speech. *See, 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Virginia State Bd.*, 425 U.S. at 765 ("even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of [commercial] information does not serve that goal").

In its misapplication of the required *Dun & Bradstreet* analysis to the issue before it in *Trans Union*, the court of appeals ignored the purpose for which Trans Union provided the consumer information (*i.e.*, the context) and, instead, viewed the transaction as merely the sale by one business (Trans Union) of goods (target marketing lists) to another business with no further analysis. The consumer information communicated by Trans Union was, in fact, provided to marketers for the purpose of facilitating the free flow of information to perhaps millions of consumers, a societal benefit implicating public concerns, and therefore entitled to more than simply a blanket characterization as "private" commercial speech of lesser First Amendment value.

III. LEFT UNCORRECTED, THE COURT OF APPEALS' DECISION THREATENS FIRST AMENDMENT FREEDOMS ESSENTIAL TO THE VALUABLE MARKETPLACE OF INFORMATION.

Widely disseminated, accurate consumer information provides significant benefits to the public. As explained above, this information promotes credit availability to consumers and makes possible informed employment, housing and insurance decisions, all at lower cost than would otherwise be available.[6] Reliable consumer information also allows businesses to offer goods, services and credit opportunities to those specific consumers most likely to purchase or want them, thereby reducing the associated costs for the provider, increasing competition for consumers, and reducing the cost to the consumer. *See, e.g., Virginia State Bd.*, 425 U.S. at 765 n. 20 (noting that the free flow of information about pharmaceutical pricing was estimated to result in consumer savings of "very substantial magnitude" rendering it speech of public concern). In addition, consumer reporting agencies provide accurate and verifiable information to law

[6] *See*, Kitchenman, *US Credit Reporting*, at 8 ("Portable credit histories have freed both banks and consumers to be more cost [conscious] specialists. Consumers can shop [for] credit from the low cost provider, confident that they will evaluate the application against their entire credit history."); John M. Barron and Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience*, at 1 (2000) <http://www.privacyalliance. org/resources/staten.pdf> ("credit bureau data has made a wide range of credit products available to millions of households who would have been turned down as too risky just a generation ago").

enforcement authorities and, where appropriate, to national security agencies.[7] Finally, consumer information is often used by non-profit and politically affiliated groups to contact and encourage potentially interested persons to participate in the political process or other community activities.

A court may conclude that not every type of information or disclosure by a consumer reporting agency is speech of public concern entitled to the highest level of First Amendment protection. While some consumer information is of public concern because it provides significant societal benefits, other such information may be entitled to lesser First Amendment protection. Moreover, other countervailing interests may weigh in favor of or against providing heightened First Amendment protection to certain forms of consumer information reporting. These countervailing interests are also of varying degrees of public import, deserving of more or less consideration depending upon the specific circumstances. *See, e.g., U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1235 (10th Cir. 1999) ("privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy."). As this Court's prior decisions make clear, the balancing of these public and private interests is at the heart of the "content,

[7] *See*, 15 U.S.C. § 1681f (Disclosures to Government Agencies); 15 U.S.C. § 1681u (Disclosures to FBI for Counterintelligence Purposes); 12 U.S.C. § 1681v (Disclosures to Governmental Agencies for Counterterrorism Purposes).

form, and context" analysis which is required to determine the level of protection to be afforded particular speech. In holding that a consumer reporting agency's reporting of accurate consumer information for a price is always and only of "private" concern, the restriction of which is subject only to intermediate scrutiny, the court of appeals fails to apply this balance to its analysis.

The court of appeals' blanket rule threatens vital consumer reporting agency practices. If unchanged and relied upon by legislatures or other courts addressing similar restrictions on speech,[8] the court of appeals' decision promotes the erroneous assumption that additional restrictions on consumer information reporting will be subject to only intermediate scrutiny, regardless of the specific content, form or context of the speech. The consequences of such an eventuality caution against the departure from long-standing United States Supreme Court precedent. Because the American economy depends on the efficient and accurate reporting of consumer-related information, any obstruction of the free flow of this information must, under appropriate circumstances, be subjected to strict First Amendment scrutiny. Unless the court of appeals' decision is reversed as to the blanket rule that all consumer reporting agency speech for a price

[8] The court of appeals' blanket rule has already been relied upon in *Individual Reference Services Group, Inc. v. FTC*, 145 F.Supp.2d 6 (D.D.C. 2001) where the district court held that restrictions on the sale of credit header information is subject to intermediate scrutiny because the speech at issue "does not involve any matter of public concern." *Id.* at 40-41.

is of purely private concern, the First Amendment protection afforded such speech will be irreparably diminished.

CONCLUSION

For the reasons set forth above, Trans Union LLC's petition for writ of certiorari should be granted and the decision of the court of appeals should be reversed or modified in a manner consistent with this Court's prior decisions regarding the analysis to be employed in determining the level of constitutional scrutiny to be applied to governmental efforts to restrict consumer reporting agency speech protected by the First Amendment.

Respectfully submitted,

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